

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND BOATWRIGHT,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

April 16, 2002

No. 229573

Wayne Circuit Court

LC No. 99-924752-NO

Before: K.F.Kelly, P.J. and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing this negligence action with prejudice for failure to provide discovery. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arises out of a motorcycle accident that plaintiff alleged was caused by an improperly maintained street surface. His initial complaint, filed in 1998, was dismissed without prejudice in February 1999. The complaint in this case was filed in August 1999. In June 2000, defendant moved to dismiss the action, asserting that plaintiff had failed to answer interrogatories sent the previous February and failed to appear at three scheduled depositions. At the time the motion was first heard, the trial court instructed plaintiff to be deposed on July 10, 2000, and took the matter under advisement for two weeks. Plaintiff did not appear for his deposition. After a second hearing, the court granted defendant's motion to dismiss. The court denied plaintiff's motion for reconsideration.

On appeal, plaintiff first argues that the trial court erred in dismissing his action because there was no violation of a written court order. This argument is without merit. Under MCR 2.313(D), the court is permitted to impose sanctions, including dismissal, "without first requiring that an order compelling discovery enter and be violated by a party." 2 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2313.4, p 403.

Plaintiff also argues that the trial court erred by failing to evaluate other options before ordering dismissal. It is within the trial court's discretion to sanction a party for violating the discovery rules. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 265; 617 NW2d 777 (2000). Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). The

factors that should be considered in determining the appropriate sanction include: (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests or refusal to disclose witnesses; (3) the prejudice to the other party; (4) the length of time before trial that the other party received notice of a witness; (5) whether there is a history of deliberate delay; (6) the degree of compliance with other provisions of the court's discovery orders, (7) whether there was an attempt to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Id.*

On this record we find no abuse of discretion. Obstruction of discovery was not limited to a single instance. Not only did plaintiff continuously delay being deposed, he also failed to answer interrogatories, so that at the time the case was dismissed he personally had provided no information about his accident. Further, contrary to plaintiff's argument, the court did consider other options before dismissing the case, namely, it gave plaintiff one last chance to be deposed and delayed ruling on defendant's motion to dismiss. Plaintiff's unexplained failure to apprise his attorney of his changed address caused him to forgo that opportunity.

We agree with the court's assessment that plaintiff had lost interest in pursuing his case and we find no abuse of discretion in the court's decision to dismiss the matter.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh